IN THE

Supreme Court of the United States

October Term, 1958

No. 378

ANONYMOUS NOS. 6 AND 7,

Appellant,

against

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OPPOSING MOTION TO DISMISS

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Questions Presented

Whether section 90, subdivision 10, of the Judiciary Law of the State of New York, in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in these cases, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellants who are not attorneys at law and who had been told before their questioning by a member of the Inquiry staff that evidence of a prima facie case of crime had already been gathered and was

ready to be sent to the District Attorney for prosecution and who nevertheless were denied the presence of their counsel in the courtroom during the questioning as a result of which the appellants refused to answer certain questions?

Whether the judgments on appeal in the circumstances stated in the previous questions denied to appellants such due process?

Argument

The case is ripe for the exercise of this court's jurisdiction to review it on the merits. The motion to dismiss concedes (p. 5) that appellants "did raise a constitutional question in the New York Courts", namely, whether the denial of counsel in the circumstances of this case did "deprive appellants of a right protected by the due process clause of the Fourteenth Amendment?" The jurisdictional statement shows that the questions presented are substantial and important. The case should be decided on this appeal. Absent remedy in the form of appeal, certiorari should be granted on the instant papers under 28 U. S. C., Section 2103.

I. Appeal lies here.

In *Matter of Groban*, 352 U. S. 330, this Court wrote (pp. 331-332):

> "The Ohio Supreme Court construed Section 3737.13 to authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal."

The instant case is substantially similar. Here, too, appellants attack the constitutionality of the applicable part of subdivision 10, section 90, Judiciary Law of the State of New York. Here, too, the New York courts construed that statute to authorize the exclusion of counsel. As the jurisdictional statement shows (p. 3), the instant

case was decided upon the authority of the companion case. In the companion case (5 A. D. 2d 790, leave to appeal denied, 4 N. Y. 2d 676) the Appellate Division wrote (5 A. D. 790):

> "The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); * * *.' It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

The dismissals by the New York Court of Appeals "upon the ground that no substantial constitutional question is involved" (4 N. Y. 2d 1034) were in effect affirmances of the Appellate Division on the merits, *Tumey* v. *Ohio*, 273 U. S. 510; *Matthews* v. *Huwe*, 269 U. S. 262.

The only distinction between the quotation from *Groban* and the instant case is that here the New York Court of Appeals did not itself write the decision which construed the statute as authorizing the exclusion of counsel, but in effect affirmed that construction by the Appellate Division. That, it is submitted, is a distinction without a difference. Substantially the situations are the same.

"The purpose" of the highest-state-court-requirement on an appeal to this court based upon repugnancy of a state statute to federal law is that the highest state court should be "apprised" in order that the highest state court should have an "opportunity authoritatively to construe" the state statute, *Wilson* v. *Cook*, 327 U. S. 474, 480. That purpose was fully served here. The New York Court of Appeals was apprised by the Appellate Division decision that part of subdivision 10, section 90, of the Judiciary Law, has been construed and applied so as to deny counsel in the

teeth of a claim of federal due process. It had an opportunity authoritatively to construe the statute. Indeed, it did so by in effect affirming the decision of the Appellate Division.

The motion to dismiss states that appellants did not attack the constitutionality of the statute in the New York courts and cites *Wilson*. In *Wilson* it was held (p. 480) that in order to support an appeal to this court it must appear that the validity under federal law of the state statute, as construed and applied, "has either been presented for decision to the highest court of the state (citations), *or* has in fact been decided by it (citations)" (emphasis supplied).

Since, as already appears, the situation herein is the substantial equivalent of a construction by the New York Court of Appeals that the instant statute authorized the exclusion of counsel, it is of no significance that appellants did not attack the constitutionality of the statute in the New York courts. The appeal lies under the second of the alternatives quoted from *Wilson*.

II. Should this court find that for failure to attack the constitutionality of the statute in the New York courts remedy in the form of appeal is not available, then appellants invoke this court to grant certiorari on the instant papers under 28 U. S. C., Section 2103.

The jurisdictional statement shows that the questions presented are both substantial and important, that this court has recently reaffirmed the "high place", *Cicenia* v. *La Gay*, 357 U. S. 504, 509, in our scheme of procedural safeguards of the right to employ counsel in a criminal case and has granted certiorari "because of the serious due process implications that attend state denial of a request to employ an attorney," *Crooker* v. *California*, 357 U. S. 433, 434. There is no need to burden the court with a restatement of that showing here. The court is respect-

fully referred to the authorities, analysis and reasons for that showing made on pages 10-19 of the jurisdictional statement.

The motion to dismiss argues that the federal question presented is not "substantial" (p. 5) and cites *Groban*, *Crooker* and *Cicenia* on that head. The jurisdictional statement (pp. 10-19) also shows that investigation of the causes of a fire by a fire marshal (*Groban*) or preliminary police investigation (*Crooker* and *Cicenia*) cannot by reason or authority be equated with the instant Judicial Inquiry conducted by a Justice of the New York State Supreme Court in the calm atmosphere of a courtroom and with a large staff of counsel on one side. A courtroom is the one place in the world where a person accused should not be denied counsel.

Conclusion

The case should be reviewed by this court on its merits either on this appeal or, in the alternative, by certiorari granted upon the instant papers under 28 U. S. C., Section 2103.

Respectfully submitted,

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